92-1243

No.

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GERALD BENECKE, Individually and t/a TCB TOWING,

Petitioner,

vs.

BOROUGH OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KOHOUT and JOHN DOES (1-50),

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the petitioner, an automobile towing contractor, whose procedural due process rights had already been judicially determined to have been violated by a municipality and its police department on 35 separate occasions by the filing of unconstitutional complaints against him, has established, at the least, a *prima facie* case for vindication and damages pursuant to 42 U.S.C. § 1983 and in the light of *Carey v. Piphus*, 435 U.S. 247 (1978), and related authority?

LIST OF PARTIES

Petitioner, Gerald Benecke, was the plaintiff-appellant, in the proceedings before the Supreme Court of New Jersey.

Respondents, Borough of Fort Lee, Salvatore Careri, Joseph Zevitz and Carol Kohout, were defendants-respondents in the proceedings before the Supreme Court of New Jersey.

The complaint below, pursuant to New Jersey practice, also names as defendants John Does (1-50). These Doe defendants, all police officers of the Borough of Fort Lee are not necessary parties at this stage of the case.

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No.

In The

Supreme Court of the United States

October Term, 1992

GERALD BENECKE, Individually and t/a TCB TOWING,

Petitioner,

vs.

BOROUGH OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KOHOUT and JOHN DOES (1-50),

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the Supreme Court of New Jersey dated October 20, 1992 is unreported to date and is printed in Appendix A, 1a, *infra*. The order granting respondents summary judgment, of the Superior Court of New Jersey, Law Division, Bergen County, dated June 4, 1991, is unreported and is printed in App. C, 8a. The

opinion affirming the order of the Law Division, of the Superior Court of New Jersey, Appellate Division, decided July 21, 1992, is unreported and is printed at App.B, 3a.

STATEMENT OF JURISDICTION

The order, and for purposes of this Court, the judgment of the Supreme Court of New Jersey, was entered October 20, 1992 and the time within this petition may be filed extends to and includes January 19, 1993. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257. The New Jersey Supreme Court's order denying the petition for certification of petitioner herein, constitutes the discretionary denial by the court of last resort of the State of New Jersey of review of a lower state court judgment. N.J. Court Rules, R. 2:2-l(b) and R. 2:12-3(a). Such judgment is thus properly brought here for purposes of final determination pursuant to 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [No State shall] deprive any person of life, liberty, or property, without due process of law.
> . . .

Title 42 U.S.C. § 1983, provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to

> the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress.

STATEMENT OF THE CASE

In 1978, this Court, in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), specifically decided that:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . , we believe that the denial of procedural due process should be actionable for damages without proof of actual injury.

In spite of this clear directive, that deprivation of due process rights requires vindication, even without proof of actual injury, the New Jersey state courts have denied petitioner even the opportunity to prove his actual damages when the due process deprivation has already been conclusively established.

Petitioner, Gerald Benecke, in 1988, 1989 and through today, operates a business involving, among other things, the towing and storage of motor vehicles for a fee (App. D, 11a, First Count, ¶1,2). On February 7, 1989, the Municipal Court of the Borough of Bogota, County of Bergen, State of New Jersey, dismissed 35 complaints which had been filed against petitioner by various members of the Borough of Fort Lee Police Department. Each complaint was specifically dealt with by the court and each was found to be a violation of petitioner's constitutional rights to due

process (App. E, 15a). This ruling was appealed by the respondent Borough (App. F, 32a), which appeal was dismissed on the merits (App. G, 35a) and not further appealed by respondent Borough, or anyone else, thus becoming a final judgment.

Only eight days following dismissal of those 35 complaints, respondent Borough, filed another 224 complaints (a total of 259) (App D, 12a, ¶11), all of which resulted in verdicts of not guilty; the Municipal Court of Palisades Park, Bergen County, State of New Jersey, finding, on July 28, 1989 (App. H, 37a), that the ordinance which was the basis for the alleged violations did not apply to petitioner in the first instance. These determinations were confirmed by order of August 1, 1989 (App. I, 42a) and again appealed by respondent Borough (App. J, 44a). As with the initial 35 complaints, the appeal respecting the 224 complaints was likewise dismissed with prejudice (App. K, 47a), which was not further appealed by respondent Borough, or anyone else and likewise became a final judgment.

Unfortunately for petitioner, subsequent to the issuance of the first 35 complaints, but prior to their ultimate dismissals, petitioner's application for a towing license was presented to the Borough Council on December 8, 1988 (App. L, 49a), and by unanimous vote petitioner was denied a towing license for 1989 solely due to the existence of the complaints against him (App. M, 53a), all of which complaints were ultimately dismissed for procedural due process violations (App. E, 15a), and respecting an ordinance which was later found not to apply to petitioner anyway. (App. H, 37a). The income lost from petitioner's inability to work in 1989 due to his license having been denied constitutes a portion of the actual damages incurred.

Petitioner then filed his action at law for damages arising out of, *inter alia*, respondent's continued course of tortious, illegal and unconstitutional conduct. Reliance upon 42 U.S.C. § 1983 for

damages arising out of respondents' violation of petitioner's due process rights was specifically pleaded in his original complaint (App. D, 14a; Second Count, ¶2).

On May 31, 1991, the trial court determined that petitioner's claims did not warrant consideration as a cause of action. The court stated (App. N, 55a):

> Here there is no right, privilege or immunity being deprived, one reason. Second reason is the nature of the defect and it just can't be that every time there is a procedural defect throwing out claims, even if they're in great number. That could not give rise to a 1983 cause of action. I'm satisfied that's not intended.

Petitioner appealed this trial court ruling, which resulted in an opinion which analyzed petitioner's case in the context of the requirements for proofs in an action based upon *substantive* due process violations (App. B, 3a) and affirmed the trial court's dismissal of the action.

Petitioner herein then filed a petition for certification in the Supreme Court of New Jersey requesting its discretionary review of the appellate decision. The petition for certification was denied (App. A, 1a).

REASONS FOR GRANTING THE WRIT

This case presents an all too common fact pattern resulting in an all too common deprivation without recourse to basic actions cognizable at law. Since *Carey v. Piphus, supra*, there has been no doubt that deprivation of a citizen's constitutional due process rights constitutes the basis for a cause of action, in and of itself. If

state courts are allowed to disenfranchise a citizen's right to redress by arguably ignoring this Court's *imprimatur*, then how can any citizen or court feel safe that this Court's decisions are ever followed. Indeed, it should not be forgotten that state courts must follow this Court's decisions in 42 U.S.C. § 1983 matters. *Hutto v. Davis*, 454 U.S. 370 (1982), and not disregard such decisions in favor of inapposite case law and misguided police conduct.

I.

REVIEW SHOULD BE GRANTED BECAUSE THE NEW JERSEY COURTS' DECISIONS CONSTITUTE A FUNDAMENTAL BREACH OF THIS COURT'S EXPRESS PRESCRIPTION FOR PRESENTATION OF A *PRIMA FACIE* CASE FOR REDRESS BASED UPON A VIOLATION OF A CITIZEN'S PROCEDURAL DUE PROCESS RIGHTS.

As was quoted from *Carey v. Piphus, supra*, the very denial of procedural due process constitutes a sufficient foundation for an actionable cause. Such cause is, by its very nature, *i.e.*, the vindication of a violation of a civil right, cognizable under 42 U.S.C. § 1983.

This legislation was intended to "create a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured" to them by the Constitution. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Incorporated within the protection provided by the Civil Rights Act is the right to due process, as set forth in the Fourteenth Amendment to our United States Constitution. This includes both substantive and procedural due process as the Fourteenth Amendment states:

> nor shall any state deprive any person of life, liberty or property without due process of law.
>
> . . .

Procedural due process is intended to protect persons, not from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty and property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth finding process . . ." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Such rules "minimize substantively unfair or mistaken deprivations of" life, liberty or property by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The language in *Carey, supra*, was reinforced and clarified further in *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978). *Burt* also involved the denial of procedural due process rights, which in turn led to a claim for civil rights violations under 42 U.S.C. § 1983. Relying significantly upon the United States Supreme Court decision in *Carey v. Piphus, supra*, the Fourth Circuit held that "deprivation of procedural due process is an independent constitutional tort, actionable under Section 1983 with or without proof of actual injury." *Burt, id.*, at 616; *citing Carey, supra*, at 266-267. With respect to the issue of damages, the Fourth Circuit in *Burt* clarified the issue of nominal damages as opposed to compensatory damages by stating that:

> damages, other than nominal damages, are not presumed to flow from every deprivation of procedural due process. In order for a plaintiff who has suffered a deprivation of procedural due process to recover more than nominal damages, he must also prove that the procedural deprivation caused some independent compensable harm.

Id., citing Carey, supra, at 259-264.

It is clear from the holdings of *Carey, Burt* and their progeny that in order to maintain a cause of action under 42 U.S.C. § 1983 on the grounds of a deprivation of procedural due process rights, the resultant injury need not be established. The deprivation of procedural due process itself is of such significance as to support the cause of action. Petitioner herein, however, satisfies both requirements to sustain a decision in his favor:

> a. Procedural due process violations had already been judicially determined to have occurred on 35 occasions and
>
> b. Petitioner lost all of his 1989 income due to the absence of a towing license for that calendar year.

The reasoning set forth in both *Carey, supra,* and *Burt, supra,* was followed by the District Court for the Middle District of Pennsylvania in *West v. Williamsport Area Com. College*, 492 F. Supp. 90, 96 (M.D. Pa. 1980), where the Court noted:

> but a denial of procedural due process by itself, even though the deprivation of the protected interests is justified, will sustain an action for damages for mental and emotional distress, injuries compensable under the law of torts but not the law of contracts.

Thus, the weight given to procedural due process rights and violations which may arise therefrom go well beyond the normal characteristics of tort actions. The focus is primarily upon the procedural due process violation itself and not the resultant damage. However, as both *Carey* and *Burt* cautioned, the resultant damage, if proven, is part of the overall damages for which a plaintiff may be compensated.

In this case, there exist two instances whereby the deprivation of procedural due process rights have been unequivocally established. With respect to the 35 complaints dismissed on February 7, 1989, the court specifically found that the complaints themselves were constitutionally defective and violative of the petitioner's procedural due process rights. The Superior Court then dismissed the appeal taken by respondent, Borough of Fort Lee, as being totally without merit. Therefore the findings in the Municipal Court stand unaffected. The deprivation of procedural due process rights has been determined and declared. Respondents cannot now suggest to this Court that the actions taken were not constitutionally defective, nor can they argue that they were not in violation of the procedural due process rights to be afforded to the petitioner. Based upon such a finding, it naturally follows that the remaining issue to be determined is not the existence of the cause of action, but the damages, if any, which may be awarded to petitioner as arising from the deprivation of those procedural due process rights. The trial court, upon respondent's motion for summary judgment, failed to recognize the case law which holds that a deprivation of procedural due process is actionable in and of itself under 42 U.S.C. § 1983. The trial court was presented with sufficient information to establish the violation of procedural due process rights. Indeed, the Superior Court had already sustained the finding of unconstitutionality, which was not further appealed. It is thus binding upon respondents forever more. The only remaining issue was damages, since liability for violation of petitioner's due process rights was a given fact and a judicially determined precursor to this action.

With all those predicates having been established, the New Jersey appellate courts disregarded the United States Supreme Court's holdings and failed to recognize, consider or even cite to *Carey v. Piphus, supra*, which case "must be followed." The New Jersey courts' failure to recognize petitioner's right to a cause of action which stems from the "absolute" right to procedural due

process, and which was the cornerstone for this Court's determination in *Carey*, should be unforgiven. For petitioner's part, it is unconscionable!

The New Jersey appellate court went to great effort, in relying upon a Seventh Circuit case and upon a D.C. circuit case, to support its holding that petitioner was required to affirmatively prove respondent's "intent to deprive" petitioner of some right, in order to even establish a constitutional violation and to further suppport its own proposition that an "honest mistake" is not actionable.

Both *Jamison v. Mc Currie*, 565 F.2d 483 (7th Cir. 1977) and *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988), which cases were relied upon the appellate court are so distant on their facts and applicable law that the mistake may very well have been in the court's reliance upon them. Both cases are based upon "substantive" rather than "procedural" due process violations. Both cases are so fact sensitive that in *Jamison* the court even says that the constitutional cause is not available "in a case such as this" (at 486).

In *Jamison*, police failed to take a deranged fireman into custody before he shot plaintiff's decedent, a fact pattern clearly dissimilar to this case. In *Silverman*, plaintiffs complained of substantive due process violations for defendant's failure to approve their condominium conversion application. Not only were the alleged violations substantive rather than procedural in their scope, but the cases relied upon to defeat *Silverman's* cause were specifically related to substantive due process violations.

The Appellate Division in this case failed, however, to follow basic, long established and clearly enunciated laws as set forth by this Court in *Carey v. Piphus, supra.* The precise issue of the right to bring a cause of action under 42 U.S.C. § 1983 for *procedural*

(not substantive) *due* process violations was there succinctly set forth. The teachings of *Carey* are well phrased and are indeed the very foundation for petitioner's legal right to a cause of action in this case.

The portion of the decision in *Carey*, "overlooked" by the New Jersey courts is of paramount importance and needs to be repeated:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . ., we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Id. at 266.

As was stated in *Burt v. Abel, supra*, at 616:

> *Carey* makes clear that a deprivation of procedural due process as an independent constitutional tort, actionable under Section 1983 with or without proof of actual injury.

In short, Gerald Benecke need not show more than that his procedural due process rights had been violated to prevail, not only on respondent's motion for summary judgment, but on the very cause itself; the Municipal Court and the Law Division already having determined the existence of 35 separate procedural due process violations before this case was even commenced. The only remaining issue should have been his damages.

It must not be forgotten that petitioner's case was not dismissed following a trial on the merits. It was dismissed for failure to present a *prima facie* case. What more need be said but that it had already been judicially determined that petitioner's due process rights had been violated.

> Even if respondent's suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process.

Carey, supra, at 266.

Likewise, the fact remains that petitioner was deprived of his right to procedural due process; not once, but 35 times? These deprivations created the *prima facie* case for § 1983 damages. Any fair reading of *Carey, supra,* requires and demands no less.

CONCLUSION

Because the New Jersey courts ignored all the decisions of this Court which they were bound to follow and because the decisions of those courts were in direct contradiction to and contravention of this Court's decisions in a matter involving federal statutory and constitutional law, this petition should be granted, the decisions below reversed and the matter remanded to the state trial court for a plenary hearing on damages.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY FILED OCTOBER 22, 1992

SUPREME COURT OF NEW JERSEY
C-260 September Term 1992
35,718

GERALD BENECKE, etc.,

Plaintiff-Petitioner,

v.

BOROUGH OF FORT LEE, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5704-90 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 20th day of October, 1992.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

Appendix A

[stamped]
I hereby certify that the foregoing
is a true copy of the original on file in my office.
s/ Stephen W. Townsend
CLERK OF THE SUPREME COOURT
OF NEW JERSEY

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION RECEIVED JULY 20, 1992

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-5704-90T5

GERALD BENECKE, Individually and t/a TCB TOWING,

Plaintiff-Appellant,

v.

BOROUGH OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, and CAROL KOHOUT,

Defendants-Respondents.

Argued: March 23, 1992 - Decided: JUL 21 1992

Before Judges Petrella, R.S. Cohen and Kestin.

On appeal from the Superior Court, Law Division, Bergen County.

William J. Pollinger argued the cause for appellant (Pollinger & Fearns, attorneys; Mr. Pollinger, of counsel and on the brief).

Timothy Saia argued the cause for respondents (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys; Jeffrey M. Kadish of counsel; Mr. Saia on the brief).

Appendix B

PER CURIAM

Defendants prevailed on their motion for summary judgment seeking a dismissal of plaintiff's claim for damages, attorney's fees and costs under 42 *U.S.C.* § 1983. We affirm.

In 1988 some 35 summonses were issued to plaintiff for towing motor vehicles in Fort Lee without being licensed pursuant to ordinance. All these summonses were dismissed on February 7, 1989 in the Bogota Municipal Court either because they were not properly sworn to by the issuing police officers, *State v. Salzman*, 228 *N.J. Super.* 109 (App. Div. 1987), or were not under oath at all. *R.* 3:3-1(a); *R.* 3:3-2. Fort Lee's appeal to the Law Division was dismissed on the merits.

Later in February 1989, within a few days after the aforementioned dismissals, 224 new summonses were issued alleging additional violations during 1988. These were eventually dismissed in the Palisades Park Municipal Court because, by its own terms, the ordinance was held to require licensure of towing operations only when the vehicles being towed were unable to operate under their own power. It was stipulated that all the vehicles involved in the 224 summonses were operable. Fort Lee's appeal to the Law Division was dismissed on double jeopardy grounds.

In the meantime, on November 9, 1988, plaintiff had applied for a Fort Lee towing license. On December 8, 1988, the Mayor and Council denied plaintiff's application on the basis of the then pending municipal court proceedings. The resolution denying the license also cited a report from the police department that plaintiff had engaged in substantial towing operations without being licensed and that over 500 summonses had been issued to plaintiff without having yet been adjudicated.

Appendix B

Plaintiff's complaint in this matter alleged a conspiracy on the part of defendants to harm him in the business sense and to violate his constituitional rights. Plaintiff also alleged the filing of false and unconstitutional complaints under color of law.

Plaintiff asserts that he was denied due process of law when he was required to defend numerous summonses which were dismissed because of formal defects or because they were determined to be without adequate basis in the language of the licensing ordinance. Absent a showing of intent to deprive plaintiff of his constitutional rights under color of law, or of a reckless disregard of those rights, plaintiff cannot prevail. *Jamison v McCurrie*, 565 *F.2d* 483 (7th Cir. 1977). The record before us contains no indication of what factual support plaintiff has for his allegations of conspiratorial activity or how he plans to prove that the conduct of defendants was intentional or in reckless disregard of his rights. In order to survive a motion for summary judgment, the respondent on the motion must do more than merely allege the existence of a genuine issue of material fact. *Swarts v. The Sherwin-Williams Co.*, 244 *N.J. Super.* 170, 177-178 (App. Div. 1990). He must state what the facts are and how he intends to prove them. *Judson v. People's Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 75-76 (1954). Plaintiff has made no such showing here.

The conduct of members of the Fort Lee Police Department in issuing summonses for every perceived violation of the towing ordinance was not alone a violation of § 1983. Until a judicial determination was made that such summonses could not issue for plaintiff's conduct in towing operable automobiles, defendants may be taken to have understood that the charged conduct was covered by the ordinance. Plaintiff has not indicated how he plans to prove the contrary.

Appendix B

The failure of the charging officers to prepare properly verified summonses in the first 35 instances does not amount to a § 1983 violation either. Assuming defendants' vicarious liability, errors in issuing summonses with defective oaths may be taken to be mistakes, but honest mistakes are not actionable under § 1983. *Silverman v. Barry*, 845 *F.2d* 1072, 1080 (D.C. Cir. 1988), *reh'g denied en banc* 851 *F.2d* 434 (D.C. Cir. 1988), *cert. denied* 488 *U.S.* 956, 109 *S. Ct.* 394, 102 *L. Ed.* 2d 383 (1988). All but a few of the 35 summonses that were dismissed in February 1989 for oath problems reflected charges dating from late January to early April 1988. The failure of members of the Fort Lee Police Department to understand and conform to our October 27, 1987 decision in *State v. Salzman, supra,* within a few months, while unfortunate, does not, without specific proof of some special objective directed at plaintiff, rise to the level of a § 1983 violation. *Cf. State v. Brennan*, 229 *N.J. Super.* 342, 348 (App. Div. 1988).

The decision of the Mayor and Council to deny plaintiff's license application while 259 summonses were pending against him also does not give rise to a § 1983 cause of action. Even if such a determination is seen as the product of confusion or negligence, it is not actionable under § 1983. *See Silverman v. Barry, supra*. The Mayor and Council's cautious action while 259 summonses were pending can hardly be faulted. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819, 102 *S. Ct.* 2727, 2738, 2739, 73 *L. Ed. 2d.* 396, 410, 411 (1982).

In summary, it is a basic tenet of 1983 jurisprudence that not every wrongful or improper deprivation of liberty by public officers is actionable. *Parrat v. Taylor*, 451 *U.S.* 527, 537, 101 *S. Ct.* 1908, 1913, 68 *L. Ed. 2d.* 420, 429-430 (1981). Inadvertent errors, honest mistakes, confusion or negligence in the performance of official duties do not warrant redress under that statute. *Silverman v. Barry, supra.*

Appendix B

The very act of issuing 259 summonses which were later found defective or not enforceable because of the wording of the ordinance does not give rise to a cause of action under § 1983 either. However mistaken the police may have been, plaintiff must be prepared to show that conduct attributable to the defendants was undertaken with a design to deprive plaintiff of a constitutional right or in reckless disregard of plaintiff's constitutional rights. *Jamison v. McCurrie*, 565 *F.2d* 483 (7th Cir. 1977). Plaintiff has made no adequate showing of his ability to introduce such factual matter. Without some clear indication that plaintiff has factual proofs to demonstrate intentional misconduct or its statutory equivalent on the part of defendants when the summonses in question were issued, it cannot be said that there is any prospect that defendants might be found to have acted in any way other than to enforce an honestly held understanding of what the ordinance stood for, however misguided that understanding may later have been determined to be.

Affirmed.

[stamped]
I hereby certify that the
foregoing is a true copy of the
original on file in my office.
Clerk

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY FILED JUNE 4, 1991

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. 1-39450-89

Civil Action

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File No. 08-456 U JK/TS

BENECKE, GERALD, individually and t/a TCB TOWING,

Plaintiff,

v.

BOROUGH OF FORT LEE, et al.,

Defendants.

ORDER

THIS MATTER having been brought before the Court on motion of MORGAN, MELHUISH, MONAGHAN, ARVIDSON, ABRUTYN & LISOWSKI, attorneys for defendants, Borough of Fort Lee, Careri, Zevitz and Kohout for an Order granting summary judgment, and the Court having considered the matter

Appendix C

and having heard argument of counsel on May 3, 1991 and May 31, 1991 and good cause appearing;

IT IS on this 4 day of June, 1991;

ORDERED, that summary judgment is hereby granted for reasons expressed on the the record on May 3, 1991 and May 31, 1991 on behalf of defendants Borough of Fort Lee, Careri, Zevitz and Kohout; and it is further,

ORDERED, that within copy of his Order shall be served upon all counsel within 7 days of the date hereof.

s/ Marguerite T. Simon
MARGUERITE T. SIMON, J.S.C.

APPENDIX D — COMPLAINT AND JURY DEMAND FILED AUGUST 18, 1989

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO.:

Civil Action

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Attorneys for Plaintiff
Our File No : P 17,887(b)

GERALD BENECKE, Individually and t/a TCB TOWING,

Plaintiffs,

vs.

BOROUGH OF FORT LEE, a Municipality of the County of Bergen, State of New Jersey; SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KOHOUT, JOHN DOES 1-50 (proper names being unknown at the time of the filing of this Complaint),

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiffs, Gerald Benecke, indvidually and t/a TCB Towing complaining against defendants, says:

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FIRST COUNT

1. Plaintiff, Gerald Benecke, is a citizen of the State of New Jersey and the sole proprietor of a company known as TCB Towing, which company operates its business in Palisades Park, New Jersey and has customers located within the defendant Municipality, Borough of Fort Lee.

2. The business of plaintiff, Gerald Benecke, t/a TCB Towing is, among other things, the towing and storage of motor vehicles for a fee.

3. For the most part, plaintiff tows vehicles from private property at the request of the owners of the private property, such vehicles being capable of being operated under their own power; however, having been left on the property owners premises without the property owners permission.

4. Plaintiff, prior to 1989 had been towing for private customers within the Borough of Fort Lee for many years.

5. From 1987 (and perhaps prior thereto) through and including the time of the filing of this Complaint, defendants have been involved in a conspiracy to destroy plaintiff's business, violate plaintiff's constitutional rights, preclude plaintiff from doing business with his customers, many of which he has had for many years, and otherwise to harm plaintiff individually and as a businessman.

6. The individual defendants, Careri, Zevitch, Kohout and the John Doe defendants have each contributed to the violation of plaintiff's constitutional and civil rights by creating false complaints, directing the filing of false complaints, directing the filing of unconstitutional complaints, and otherwise engaging in a course of conduct knowing full well that the sole purpose was to

harm the plaintiff and his business.

7. The course of conduct by the defendants was pursuant to authority granted to Deputy Chief Salvatore Careri as a Police Officer of the defendant Borough and therefore was the standing policy of the Borough as enforced by the Police Department. All actions by the Police Department and the Borough were performed under the color of State Law knowing full well that there was, in fact, no legal violation which plaintiffs had been engaged in.

8. Indeed, even though many complaints against the plaintiff had been dismissed either as being unconstitutional or plaintiff had been found not guilty, defendants and each of them continued their course of conduct by directing that an appeal be taken from such findings, knowing full well that the appeals are frivolous, without legal justification and improper under the law and statutes and Court Rules.

9. As the direct and proximate result of the defendants' conduct, plaintiff has been injured and has required substantial medical treatment as a result thereof and has been required to expend large sums of money on account of his injuries.

10. Further, as the direct and proximate result of defendants' conduct, plaintiff has undergone extensive mental pain, suffering and anguish, has lost considerable business and continues to lose business.

11. As the result of defendants' conduct, plaintiff has been required to expend large sums of money to defend himself in Municipal Court on account of 259 Summonses which were illegally filed against him and which Summonses were either dismissed or of which plaintiff was found not guilty.

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12. Further, as the direct and proximate result of defendants' conduct, plaintiff was required to expend large sums of money for purposes of obtaining a variance in an adjoining Municipality which defendants attempted to hinder in a further attempt to destroy plaintiff and his business.

WHEREFORE, plaintiff demands judgment against defendants for both compensatory damages, punitive damages as well as attorney's fees, interest and cost of suit.

SECOND COUNT

1. Plaintiff repeats all allegations of the First Count as if set forth herein at length.

2. As the direct and proximate result of defendants' conduct, plaintiff's constitutional and civil rights have been violated, more particularly 42USC section 1983 in that plaintiff's due process, both procedural and substantive, equal protection, right to earn a living, right to be free from Governmental interference in its business, violation for deprivation of life, liberty and property have all been caused by defendants' conduct and actions.

3. Additionally, defendants' are liable for their bad faith in causing the constitutional and civil rights deprivations referred to above.

WHEREFORE, plaintiffs demand judgment against defendants for compensatory damages, punitive damages, attorney's fees and costs of suit.

THIRD COUNT

1. Plaintiffs repeat the allegations of the First and Second

Counts as if set forth herein at length.

2. As a direct and proximate result thereof, defendants are responsible for plaintiffs' attorney's fees in this action pursuant to 42USC section 1988.

WHEREFORE, plaintiffs demand judgment against defendants for attorney's fees and cost of suit.

FOURTH COUNT

1. Plaintiffs repeat all allegations of the First, Second and Third Counts as if set forth herein at length.

2. The individual defendants and each of them are further liable to the plaintiffs on account of the wanton, willful and malicious misconduct in office as well as their violation of their sworn duties to uphold the law as well as their intentional conduct, which conduct was for the sole purpose of harming plaintiff and plaintiffs business.

WHEREFORE, plaintiffs demand judgment against the individual defendants specifically for compensatory damages, punitive damages, attorney's fees, interest and costs of suit.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable herein.

POLLINGER, FEARNS & KEMEZIS, P.A.
Attorneys for Plaintiff
s/ William J. Pollinger (illegible)
By: William J. Pollinger

DATED: August 16, 1989

APPENDIX E — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 7, 1989

MUNICPALCOURT
COUNTY OF BERGEN
BOROUGH OF BOGOTA
DOCKET NO.

February 7, 1989

THE STATE OF NEW JERSEY

Plaintiff

vs.

T.C.B. TOWING

Defendant

BEFORE:
HON. ROBERT A. BARON

APPEARANCES:
HARRY CARROLL, ESQ., Municipal Prosecutor for the State
WILLIAM POLLINGER, ESQ., for the Defendant

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* * *

[8] THE COURT: As I told the Prosecutor yesterday. Now, there's been a motion made. I haven't received any certifications, briefs or other material from the State in opposition to the motion. And all I have before me are your moving papers. At this point, following the Rules of Court, I don't think that anybody could submit anything at this late period.

MR. POLLINGER: I agree.

THE COURT: The motion was returnable tonight. It was timely and complete. I — so I'm at the position where I guess I should rule on the motion. You don't have anything to say, or do you, Mr. Carroll?

MR. CARROLL: Judge, as I indicated to Mr. Pollinger and then to the Court. Judge, basically my position was a case decided by Mr. Pollinger are accurate. And the State versus Salzman, Judge, on page one twelve of that decision does indicate that a complaint — "the law enforcement official must have his or her oath taken on the complaint by a judicial officer, court clerk or deputy court clerk." I [9] reviewed all the summonses, Judge and that did not take place. I do not interpret the Salzman decision, Judge, citing State versus Ross the same way that the Salzman court did. I don't believe Ross necessarily applies because in that case it was a private citizen rather than a police officer. I further think Salzman is contrary to the rule which is also cited Judge. Which is 7:3-1b which talks about a law enforcement officer "may make, sign and issue such a complaint and summons." and without a requirement that it be sworn to, Judge. But basically I believe it's an opinion that the Court must render as to whether the Salzman decision is on point and binding. If it is, then I believe the

summonses must be dismissed. I would argue that Salzman is contrary to the court rule which is 7:3-1b, which provides that an unsworn complaint is proper.

MR. POLLINGER: If your Honor pleases, may I respond to that, sir?

THE COURT: Yes, you may.

MR. POLLINGER: Thank you, sir. Mr. Carroll is entitled to his opinion. However, his opinion is not what the opinion of the Appellate Division is. And I suggest to the Court that the Appellate Division is the binding authority in this case rather than Mr. [10] Carroll's interpretation of the rule. The Appellate Division has specifically said the following: "Ross", that is State versus Ross, instructs that a "law enforcement official who utilizes the form of complaint and summons aauthorized by Rule 7:3-1b", and I suggest that that is the rule that Mr. Carroll is referring to, "must nonetheless have his or her oath taken on the complaint by a judicial officer, court clerk or deputy court clerk who must also make a probably cause determination that an offense has been committed." "The officer enjoyed the advantage permitted by Rule 7:3-1b of issuing an unsworn to summons before a complaint had been filed" and that is what that letter that we previously looked at refers to. "And before a probable cause determination had been made." However, Salzman and Ross make it very clear that the purpose of having a judicial officer take the oath is twofold. Number one, that is — they are the only people who are, in fact, authorized to take an oath. And they have a job to do. And that is to make a probable cause determination. And the Court in Salzman specifically states (indiscernible), as here, there has been no determination of probable cause respecting this complaint, the summons and complaint become fatally defective. I don't know of

any other words that can [11] be more obvious and clearer in their import than the words fatally defective. To my understanding the both, or all of the summonses in State versus Ross and State versus Salzman were dismissed with prejudice as a result of violation of constitutional rights, i.e., due process. And I suggest that that is exactly the same situation that we have here and that the case is on all force.

THE COURT: Allright. Allright, Mr. Pollinger.

MR. POLLINGER: Yes, sir.

THE COURT: Upon receipt of your motion, I went over the entire file and I read the cases that you cited and I read the rules. And I made an attempt to — well, I did take each one of these summonses as a separate motion for each one. I don't know whether they've gotten out of order, but I have in front of me the summonses.

MR. POLLINGER: They had been listed in numerical order in the certification that was submitted and in the certification there was also a statement with regard to the procedural defects as to each one.

THE COURT: Yeah. The only problem is you have at the top Y54465.

MR. POLLINGER: Yes. That's a traffic summons that I have a copy of.

[12] THE COURT: I know.

MR. POLLINGER: I did not see it on the list either.

THE COURT: I don't have it here.

MR. POLLINGER: That's clearly ineffective because it's not even a complaint, anyway. And certainly a traffic summons and an ordinance violation is totally ineffective from due process standpoints.

THE COURT: Yeah. That Y54465 is on a traffic summons. The ordinance referred to is 79:4-11(2)(a). They do have parking ordinances on the back but they don't have any mention made of that ordinance on the back of the summons as being those which can be paid to the violations bureau or any other bureau. It's signed by a Patrolman Waters. It, it's a summons without any oath being administered by anyone and it says "towing without a license." It doesn't say what they were towing or where they were towing. And it doesn't describe the offense. Based on a fact that it's a quasi-criminal, it should be — and it doesn't come under the exception which is provided for in the rules for traffic offenses. I'm going to dismiss it on the basis that it's fatally defective. And this is dismissed.

Now, the next one is 02555. Which is a complaint [13] for a non-indictable offense issued — entitled the Borough of Fort Lee versus T.C.B. Towing. It says "On the 22nd day of February, 1988 at 4:27 p.m. in the municipality of Fort Lee he did unlawfully violate the provisions of an ordinance of the Borough of Fort Lee 79, Section 4-11, paragraph 2a. Did tow a 1986 Honda, color red, New Jersey registration 828 VDL without being licensed to tow in the Borough of Fort Lee" The officer issuing the summons is Sergeant Conway. The complainant is Sergeant Conway and the oath subscribed and sworn to me before this 22nd day February,

1988, Sergeant Rapoli. It says name and title of person administering oath. Based on State versus Ross and State versus Salzman, both of the Appellate Division, 228, N.J. Super 109. And based on Ross 189, N.J. Super 74. Now in all of these summonses and complaint, I won't repeat the cases. I'll just refer them Ross and Salzman. In my study of the rule and cases, I find that this is defective constitutionality and in accordance with the Rules of Court. A sergeant in a police station cannot administer the oath in such a case. It must be administered by a judicial officer, the court clerk or the deputy court clerk. And I'm going to dismiss it.

02851. Again is the Borough of Fort Lee versus [14] T.C.B. Towing. The undersigned being duly sworn on his oath deposes and says that these T.C.B. Towing on the 9th of February violated the same ordinance by towing two vehicles in the Borough without being licensed. And it says a Chevy and an Audi with license plates. It's signed by Robert Thiel as the officer. The complaint is the same officer and that signature has been interfered with. I don't know whether it was changed or erased or but there's white out over it. And the person administering the oath is Lieutenant Tercelli. For the same reasons, I dismiss that complaint.

Number 02852. Borough of Fort Lee versus T.C.B. Towing. Ninth day of February, 1440. And there's no time after 1440. It's 1440 m in Fort Lee. Same violation, did tow two vehicles in the Borough without a license, with the two vehicles described. That's signed by Patrolman Milo, number 160. The complainant is Lieutenant LaCory and the oath was administered by Lieutenant Tercelli. For the same reasons given originally, this is dismissed.

02853. It's the same form of complaint, for an non-indictable offense. Hence, it says the Borough of Fort Lee against T.C.B. Towing. February 10, 1988. Did tow the following vehicles in the

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Borough of Fort [15] Lee sans, s-a-n-s, a license. I didn't know we wrote our complaints in French. A Nissan with a license plate of New Jersey and a Suzuki with a New York license plate. It's signed by police officer L. Cilio, number 143. There's an undecipherable signature for the complainant. I don't know who it is, it's unreadable. And it's sworn to before Lieutenant Tercelli. For the same reasons and also for the reason that the complainant is vague and insufficient and because of the oath was administered by a police officer, it's dismissed.

02854. 15th of February, 1988, 11:06 a.m. Against T.C.B. Towing, same form of complaint, same violation. Towed one 1986 blue Datsun. Registration ABU 144 this date without the Borough — within the Borough without a license to tow same. That's signed by police officer Otavio of Badge 131. The complaint is signed by an undecipherable name. Sergeant somebody, I can't read it. And it's not signed by anyone, the oath is blank. That one is dismissed for the same reasons but especially the fact that nobody administered an oath.

02856. 15th of February, 1988. Same form, Borough of Fort Lee versus T.C.B. Towing. It says he towed one 1962 Dodge. Kansas registration number [16] within the Borough without a towing license. And that was is signed by Patrolman T. Water, badge 135. A sergeant signed the complaint and nobody signed the oath. No oath was administered. That one is dismissed for the same reasons.

02857. February 19th at fourteen hundred m. Did tow vehicle without being licensed. Borough — in the Borough of Fort Lee FKB 150, New York Med West. Patrolman Otavio, number 131, signed the summons. The complaint is not signed by anyone and

there's an oath taken of the person who didn't sign it by Lieutenant Tercelli. That one is fatally defective and dismissed.

02858. February 21 eighteen fifty five p.m. Did tow vehicle without being licensed. And it has a license plate number XS5 122, New York. Sergeant Ripoli is the office signing the summons. Sergeant Ripoli is the officer signing the complaint. Nobody administered an oath, it's blank. That one is dismissed as fatally defective in not being signed, any oath.

02859. Dated February 22, 1988 two seventeen p.m. Towed a 1986 oldsmobile AHX 45K within the Borough of Fort Lee without a license. 02859. The signature — there's no signature on the summons at all. There's a signature of a complainant, a Sergeant D question [17] mark. I don't know what the name is and it — he was — the person who administered the oath was a Patrolman Water, number 135. Again for the same reasons it's dismissed. Now all these dismissals are with prejudice.

MR. POLLINGER: Thank you, sir.

THE COURT: 02860. It's — is blank vs. T.C.B. Towing. And it's dated January 21, 1988. Same form violation of — between the hours of thirteen thirty six and fifteen and forty six, towed six vehicles without being licensed. This complaint, even if it was properly signed and was properly sworn to is totally defective because it doesn't say where what, how, what vehicles and where. To just say towed six vehicles, isn't enough. And I can't find that that's a sufficient charge which the defendant could meet. He'd have to be notified properly in order to meet it and the defendant. This one is signed by Police Officer Waters, number 135. He also signed the complaint. And Lieutenant Licori

administered the oath. This is dismissed for the same reasons and also that other reason that I mentioned.

02862. Borough of Fort Lee versus T.C.B. Towing on the 27th of January 1988 at three fifty four p.m. He violated by — at fifteen fifty four hours towed [18] three vehicles. They got license plate numbers. Without a license. Again, I think that the violation is vague and also it doesn't allow the defendant it doesn't give ample notice to defendant. The complaint is signed by Patrolman Flynn, number 152. The complaint is signed by Patrolman Flynn and the oath was administered by Lieutenant Licori. This is dismissed, same reasons.

02863. Is January 27, 1988. Says at four thirty five p.m. towed a vehicle 438 JXH, New Jersey within the Borough without being licensed. It's signed by Lieutenant Licori as both issuing the summons and the complaning officer. The signature of Lieutenant Licori, there's been a change. It was originally signed by somebody else, it was erased and it's changed. I don't — I don't — it's defective in a fact that I don't know who signed it originally I can't see it but it was another signature on here. The oath was administered by Lieutenant John — it looks like A-E-U-T-L. I'm reading the signature., Again, this is defective and it's dismissed.

02864. At nine twenty two p.m. towed a vehicle in the Borough without being licensed and they have a license plate number. Again, I think it's a vague statement of the violation of the statute which would [19] not allow the defendant to meet it, the proper defense. It's signed by Lieutenant Licori as both the summons issuer and the complaining. And the oath was administered by the same Lieutenant, John somebody who did 02863. That's dismissed.

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02865. Is nobody versus T.C.B. Towing because they didn't fill in the top line. It says on the 28th of January, at 02:08 a.m. he towed a vehicle without a license. It's a defective statement of the offense. It's very vague. It will not allow the defendant to meet and defend against it because there's not specific information of where who, what or when. It's signed by — the summons is signed by Michael Yost, a patrolman. The complaint is signed by Sergeant Otto. And Sergeant Otto also administered the oath to himself. This one is defective and dismissed.

02866. Is Borough of Fort Lee versus T.C.B. Towing. 28th of January, 5 p.m. At five fifty p.m. Towed a vehicle without the — within the borough without being licensed and then they put a license plate number, an Ohio plate. Signed by Patrolman Flynn as the issuer of the summons and also the complainant. And the oath was administered by Lieutenant Licori. For the same reason that is dismissed.

02867. Is January 28, 1988, twenty three, twenty [20] four p.m. At twenty three twenty four has towed a vehicle, Rhode Island, within the Borough without being licensed. Again, it's a vague statement of the offense. It doesn't allow the defendant to meet it but if more defective than that, the summons was issued by Sergeant Dalton, the cpmplainant is Lieutenant Peppard and it's not — there's not oath administered to anybody by anybody. It's blank. That's dismissed.

02868. Is the same form. This date at ten fifty one hours towed a vehicle, and they have a New Jersey registration, within the Borough without being licensed. It's signed by Patrolman Otavio, the complainant is a sergeant which I can't read and there's no one administered an oath. And that's dismissed, it's consitutionally defective.

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02869. January 29, 18988, ten fifty one a.m. At ten fifty one hours this date, towed a vehicle, New Jersey registration VWA 84M within the Borough without being licensed to do so. That's signed by Patroman Otavio. A sergeant is the complainant and no one administered an oath, it's blank. Dismissed, constitutionally defective.

02870. February 26, 1988, thirteen eighteen. Did tow a vehicle in the Borough of Fort Lee sans again. That frenchman is here again, a license to do so. It's [21] not signed by anyone. The summons is not signed, the complainant is signed by Patrolman — with a badge number 169. And Lieutenant Tercelli administered the oath. It's fatally defective, not only for the signatures and the oath but also the fact that it doesn't describe the offense in such a way that the defendant would be able to defend against it. Its dismissed.

02871. March 4, 1988. Tow a vehicle in the Borough of Fort Lee without having a license. Again the same defect. Didn't — doesn't set up the when, or how, who, what or where. The complaint is not signed by anyone and the summons is signed by Patrolman with badge number 169. And an oath was given to this unknown person who didn't sign it by Lieutenant Tercelli. Fatally defective and dismissed.

02876. April 5, 1988, ten thirty one a.m. Eleven twenty two a.m. and thirteen oh three a.m. They got three times on this one. Tow three vehicles in the Borough of Fort Lee without being licensed and they give three plate numbers. I think it is fatally defective in describing the offense and also the times because nobody describes which license plate was towed at what time and nobody says where. And the defendant would be unable to defend. It's signed by Patrolman [22] Sille, number 143. The complainant is a sergeant whose name I can't read. And the person

administering the oath, appears to be the same person. It's a sergeant and it looks like the same signature, I can't tell. It maybe a different person, it may be the same person. But, again, in your motion you say it's Sergeant Wolf in both cases. Could be, I can't tell from his signature. But this is dismissed for the same reason, fatally defective.

02877. April 6. They have two times again. Thirteen eleven p.m. and thirteen thirty six p.m. Tow three vehicles and they got three license plate numbers, without being licensed. I think the description of the offense fatally defective. It would not allow the defendant to meet and defend it with the descriptions because they got two times, three vehicles and none of this is related to one another. The complaint is signed by a police officer whose name I cannot read. Sergeant Wolf signed the complant. And he also administered the oath to himself. It's fatally defective and it's dismissed.

02878. Is May 5, 1988, twelve thirty or twelve ten. They wrote twelve thirty and then they wrote over the twelve thirty with twelve ten p.m. Did tow four cars, and they give four license plate numbers within [23] the Borough without a license. And it's signed by, it looks like Police Officer Walter, but I can't read it. The complaint is signed by Sergeant Wolf and nobody administered the oath to anyone. The oath is blank. This is dismissed.

02880. February 1, 1988, eleven thirteen m. At eleven thirteen on February 1, 1988 did tow one vehicle. And they got license plate number without a license at Washington Bridge, bridge is spelled incorrectly, Plaza Mall. Now this time they wrote it properly. They said the vehicle with the plate and where — for the first time they wrote one that you could defend, so I can't do that. However, the complaint isn't signed by anyone and the oath was taken of the person by Lieutenant Tercelli. The person who

didn't sign it swore before Lieutenant Tercelli. So that's defective.

02881. February 1, 1988, thirteen twenty seven p.m. At thirteen twenty seven on February 1, 1988 did tow one vehicle ZXA 362 New Jersey at Washington Bridge Plaza Mall. This is signed by Police Officer number 151. I can't read his name. The complant is not signed by anyone and that no one was sworn by Lieutenant Tercelli that he was telling the truth. That's defective. That's dismissed.

[24] 02882. February 1, 88 at eight thirty one p.m. At eight thirty one p.m. towed a vehicle within the Borough without being licensed with a license plate number. The description of the offense is defective. It's signed by — the summons is signed by Lieutenant Licori. He also signed the complaint and the oath was administered by a Captain whose name, last name I don't know. This is dismissed because it's constitutionally defective.

There's one other thing I want to say, to get back to one of the issues that comes up and one of the issues which was mentioned in the Prosecutor's memorandum. There's no question that in traffic offenses the police officer in charge of the police station can sign and take an oath. If a police officer, I don't care who he is, is in charge, he's got to put under his name "the person in charge". I don't know that this captain was the person in charge even, if that's what they intended to do. To just sign a name and a title is not enough. He's got to say "the person in charge of the police station" at the time that it was signed. If that was what their intent was. So I just want to make it clear to the police officers in the audience.

Allright, so 02882 is dismissed because of the [25] constitutional deficiency.

02883. Feruary 2, 1988 three forty seven p.m. At three forty

seven p.m. towed two vehicles with two license plates mentioned within the Borough without being licensed. Signed — the summons is signed by Lieutenant Licori. The complaint is signed by Lieutenant Licori. And apparently the same captain administered the oath, whose signature I couldn't read on the other ticket, on 02882. This is dismissed on the basis of the constitutionality of the police officer taking the oath.

02885. February 5, 1988. No time mentioned. Did tow five vehicles. And they got license plate numbers without the Borough — within the Borough without being licensed. The summons is signed by Police Officer Silleo, badge number 143. The complainant is John Ford, badge number 158. And the oath was administered by Detective Sergeant Strub, I guess it is. For the same reasons, this is dismissed.

02886. February 7, 1988, fourteen fourteen m. At fourteen fourteen towed vehicle 879 WYY New Jersey within the Borough of Fort Lee without being licensed. The summons is signed by Patrolman Waters. Sergeant Wolf signed the complaint and nobody administered an oath to anybody, it's blank. 02886 is dismissed.

[26] 02887. April 13, 1988, one ten p.m. Did tow four vehicles, and they have license plate numbers, within the Borough without being licensed. The summons is signed by a Patrolman Weinberg, Sergeant Wolf signed the complaint and Sergeant Wolf administered the oath to himself. That's dismissed.

02888. May 4, 1988, no time mentioned. Paragraph 2A. Did — I can't read this. Did tow a vehicle within the Borough without being licensed. And they got a license plate number. Then they have — now this is date May the fourth, 1988. And then it says 4-20-88, ten forty eight a license plate number. 4-13-88 with a

license plate number. 4-20-88 with a license plate number. And then they have after that 5-4-88 and I don't know what that means. Is it — just on the basis of the complaint, I would dismiss it, but I'll go further than that. The summons is signed by Patrolman Silleo. Sergeant Wolf signed the complaint and nobody administered an oath. There's no oath at all. That's dismissed.

02890. April 4th, no time. Did tow two vehicles. A Pennsylvania license plate and a New Jersey license plate, without being licensed. Nobody signed the summons. Patrolman, it looks like Walter, signed the complaint. And Lieutenant Tercelli administered the [27] oath. For the same reason it's dismissed.

2896. The first day of August, 1988, nine thirty four a.m. Did between January second to July thirtieth did tow four hundred and fourteen cars in the Borough of Fort Lee without being licensed. I'll just say that there is a proper signature for the summons and a proper signature for the complaint. Sergeant Wolf administered the oath. On the basis of the oath, it's dismissed. But I would dismiss it anyhow. How could anybody ever defend against towing four hundred and fourteen cars between January second and July thirtieth? It's impossible. And what four hundred and fourteen cars, and if there the same cars that we have all the other complaints about. I don't know I can't tell. This is fatally defective and it's dismissed.

03036. This is the last one. It says on divers days of 1988 he violated the ordinance. He towed a hundred and two vehicles within the Borough between August 1, 1988 and September 12, 1988 without being licensed. It's signed by a Patroman for the summons and it's signed by a sergeant as the complainant and the sergeant, the same sergeant also administered the oath to himself! Well based on the same reason I gave for 02896 I would dismiss 03036 because it's vague and it's impossible to defend. And divers

days, I never [28] heard of that one. But the oath itself, it makes it a defective complaint. so they're dismissed.

Now I believe that takes care of all of them.

MR. POLLINGER: That is correct, sir. I have nothing further.

THE COURT: Allright, they're all dismissed.

MR. POLLINGER: Thank you, sir. May I — may I have a copy of the summons numbers and that letter that I presented to you?

THE COURT: A copy of this letter?

MR. POLLINGER: Of this one here and my letter.

THE COURT: Oh, yes, yes.

MR. POLLINGER: Fine. Thank you very much, sir.

THE COURT: Um, could you do this for us?

MR. POLLINGER: Yes.

THE COURT: Could you make — could we have a copy made of that so we have — no, not the letter, I have the letter of the summons.

MR. POLLINGER: Of the summons?

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THE COURT: The summons, yes.

MR. POLLINGER: You can send me these, if you want.

THE COURT: Allright.

MR. POLLINGER: Thank you very much, Judge.

THE COURT: Allright, counsel, that's it.

[29] CASE ADJOURNED

CERTIFICATION:

I, Jill A. Leonard, assigned transcriber, do hereby certify that the foregoing Transcript of Proceedings in the matter of the State of New Jersey vs. T.C.B. Towing, heard in the Municipal Court of Bogota, New Jersey on February 7, 1989, on Tape 1, Index 9015 to 0375, is true and accurate to the best of my knowledge and ability.

DATED: 3/10/89

s/ Jill Leonard

APPENDIX F — NOTICE OF APPEAL DATED FEBRUARY 13, 1989

MUNICIPAL COURT OF BOGOTA
COUNTY OF BERGEN

Docket No. 89-0058-

CIVIL ACTION

KENNETH W. HERBERT, ESQ.
111 GRAND AVENUE
PALISADES PARK, NEW JERSEY 07650
(201) 944-9898
ATTORNEY FOR

Plaintiff

BOROUGH OF FORT LEE

vs.

Defendant

TCB TOWING

NOTICE OF APPEAL

TO: Harry G. Carroll, Esq., Prosecutor
170 Washington Avenue
P.O. Box 96
Dumont, New Jersey 07628

Take Notice that the Borough of Fort Lee, with its principal location at 309 Main Street, Fort Lee, New Jersey, hereby appeals to the Superior Court of New Jersey from a judgment of dismissal by the Municipal Court of Bogota entered on February 7, 1989 on the following summonses (see Exhibit "A" attached).

Appendix F

A sound recording was made in the Bogota Municipal Court at the time of the dismissal pursuant to R.7:4-5.

I certify that I have requested the transcript in accordance with R.2:5-3(a), and I have also made a sufficient deposit for the transcript in accordance with R.2:5-3(d).

s/ Kenneth W. Herbert
KENNETH W. HERBERT
Attorney for Borough of Fort Lee

DATED: February 13, 1989

Appendix F

SUMMONSES

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#02870
#02871
#02876
#02890
#02877
#02887
#02888
#02878
#02896

EXHIBIT "A"

APPENDIX G — ORDER FOR DISMISSAL DATED APRIL 2, 1990

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. 89-0058

Civil Action

POLLINGER & FEARNS, P.A.
485 Main Street
Hackensack, New Jersey 97601
(201) 487-5666
Attorneys for Defendant
Our File No. P-17,887(C)

BOROUGH OF FORT LEE,

Plaintiff,

v.

TCB TOWING,

Defendant.

ORDER FOR DISMISSAL

THIS MATTER having been appealed to this Court from dismissals rendered in the Bogota Municipal Court and it appearing that there is no merit to the contentions of appellant which could form the basis for a reversal of such dismissals, and for other good cause shown;

IT IS on this 2nd day of April, 1990,

Appendix G

ORDERED that this appeal is hereby dismissed with prejudice, but without costs.

s/ BENEDICT E. LUCCHI, J.S.C.
Benedict E. Lucchi, J.S.C.

[stamped]
FURTHER ORDER THAT A COPY OF
THIS ORDER BE SERVED UPON
ADVERSARY (IES) WITHIN 7
DAYS OF THE DATE HEREOF.

APPENDIX H — TRANSCRIPT OF DISMISSAL DATED JULY 28, 1989

PALISADES PARK MUNICIPAL COURT
CHANGE OF VENUE FROM FORT LEE
BERGEN COUNTY, NEW JERSEY

STATE OF NEW JERSEY,

Plaintiff,

vs.

TCB TOWING,

Defendant.

TRANSCRIPT OF DISMISSAL

Place: Palisades Park Municipal Court
Palisades Park, New Jersey
Date: July 28, 1989

BEFORE:
HON. JOSEPH R. DE MIGLIO, J.M.C.

TRANSCRIPT ORDERED BY:
DWIGHT DE STEFON, ESQ.

APPEARANCES:

WILLIAM J. POLLINGER, ESQ., Attorney for Defendant

[1] THE COURT: Please be seated. This is the Municipal Court of Palisades Park. The date is July 28th, 1989 and this is the adjourned date of a number of matters involving the Borough of

Appendix H

Fort Lee as the Complainant and TCB Towing as the Defendant in a number of alleged violations citing a violation by TCB Towing of Ordinance 79 Section 4-11 Paragraph 2A. Will Counsel please enter his appearance.

MR. POLLINGER: William J. Pollinger appearing on behalf of the defendant, sir.

THE COURT: The Prosecutor has indicated to this Court that he would not be present this morning, that he had — let me finish — that he had made all of the arguments that he felt were necessary at the last hearing and I think he has supplemented that with, with additional written argument. I've carefully considered the, the arguments of Mr. Pollinger at the, the last Session, with particularity the question of whether TCB Towing is really a defendant who falls within the pre, prescription of the Ordinance 79:4-11 2A. Under, under definitions, under the Fort Lee Ordinance, wrecker shall mean a motor vehicle employed for the purpose of towing, transporting, conveying or removing any other motor vehicle which is unable to be operated under its own power for which service a charge or fee is exacted. There is, [2] there is no evidence before me that these vehicles were in a state of being inoperative and the Prosecutor indicated he would have no evidence to indicate whether or not in fact these vehicles were inoperative and on that narrow issue I believe that the State has failed to prove a prima facie case to this Court that this defendant TCB Towing is a wrecker as used in Section 4-11.1 of the definitions which relate to Ordinance 79 Section 4-11 Paragraph 2A. This relates to all of the tickets that I have before me and they number from 03233 to 03323 and I'm going to make a general statement that all of these Tickets will be Dismissed.

MR. POLLINGER: Can I correct your numbers?

THE COURT: Yes please.

MR. POLLINGER: It, it should be from 03233 to 03456. 03323 having been Dismissed on July 21.

THE COURT: All right, I do see, I see, I see 456 here; that is the highest number?

MR. POLLINGER: Yes.

THE COURT: All right, I'll stand corrected on those numbers, so that to reiterate, it will be 03233 to 03456. If you need an Order to that effect, I'll sign it.

MR. POLLINGER: Very well, sir, I will submit it. Thank you very much.

[3] THE COURT: That's all.

MR. POLLINGER: If Your Honor, please, may I, may I include in the Order the fact that the Prosecutor stipulated that all of the vehicles were —

THE COURT: Yes.

MR. POLLINGER: — were operable?

THE COURT: No, no, he did not. He said he could not prove that they were not inoperable.

MR. POLLINGER: I believe he said.

THE COURT: Oh, to me — he may have.

MR. POLLINGER: I think he did.

THE COURT: But my recollection is, I was satisfied that he —

MR. POLLINGER: Okay.

THE COURT: — could not prove that they weren't operable.

MR. POLLINGER: Okay.

THE COURT: And on that narrow issue I'm, I'm finding, I'm reaching that conclusion.

MR. POLLINGER: Thank you very much, sir.

THE COURT: He may very well have said it, but that, that's not my recollection.

* * *

Appendix H

STATE OF NEW JERSEY)
) SS
COUNTY OF MIDDLESEX)

I, Barbara Davis, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of the State of New Jersey vs. TCB Towing, heard on July 28, 1989 in the Palisades Park Municipal Court and recorded on Tape # 1, Index #Unknown of that Court.

s/Barbara Davis
BARBARA DAVIS CERT. #246

APPENDIX I — ORDER CONFIRMING ENTRY OF JUDGMENTS OF DISMISSAL

MUNICIPAL COURT OF PALISADES PARK COUNTY
OF BERGEN STATE OF NEW JERSEY

POLLINGER, FEARNS & KEMEZIS, P.A.
485 Main Street
Hackensack, New Jersey 07601
(201) 487-5666
Attorneys for Defendant
Our File No.: P-17,887

BOROUGH OF FORT LEE,

Plaintiff,

vs.

TCB TOWING,

Defendant.

ORDER CONFIRMING ENTRY OF JUDGMENTS OF DISMISSAL

These matters having been heard before this Court on July 21, 1989 and July 28, 1989 in the presence of Joseph J. Rotolo, Jr., Esq., attorney for complainant and William J. Pollinger, Esq., attorney for defendant and the Court having heard a proffer of proof presented by the complainant, such proffer being in lieu of testimony, and the Court having determined that on the basis of that proffer complainant is unable to establish a *prima facie* case of violation by defendant of Fort Lee Revised Ordinance 4-11.2a., particularly that complainant is unable to prove that "any . . . motor vehicle which is unable to be operated under its own power" was towed by defendant, and the Court being satisfied that the

Appendix I

Complaints against the defendant should, therefore, be dismissed and for good cause shown;

IT IS on this 1st day of August, 1989;

Hereby confirmed that Complaint number 03323 was dismissed on July 21, 1989 and Complaints 03233 through and including 03456 were all dismissed on July 28, 1989.

s/ Joseph R. DeMiglio
JOSEPH R. DeMIGLIO, JUDGE
MUNICIPAL, COURT OF (illegible)
PALISADES PARK

APPENDIX J — NOTICE OF APPEAL DATED AUGUST 4, 1989

MUNICIPAL COURT OF PALISADES PARK
COUNTY OF BERGEN
Docket No.

CIVIL ACTION

KENNETH W. HERBERT, ESQ.
111 GRAND AVENUE
PALISADES PARK, NEW JERSEY 07650
(201) 944-9898
ATTORNEY FOR Borough of Fort Lee

Plaintiff

BOROUGH OF FORT LEE

vs.

Defendant

TCB TOWING

TO: Michael Ryan, Esq.
39 Tallman Place
Englewood, NJ 07631

Joseph J. Rotolo, Esq.
50 Summit Avenue
Hackensack, NJ 07601

NOTICE OF APPEAL

Take Notice that the Borough of Fort Lee, with its principal location at 309 Main Street, Fort Lee, New Jersey, hereby appeals to the Superior Court of New Jersey from a judgment of dismissal by the Municipal Court of Palisades Park entered on July 28, 1989

on the following summonses (see Exhibit "A" attached).

A sound recording was made in the Palisades Park Municipal Court at the time of the dismissal pursuant to R. 7:4-5.

I certify that I have requested the transcript in accordance with R.2:5-3(a), and I have also made a sufficient deposit for the transcript in accordance with R.2:5-3(d).

s/ Kenneth W. Herbert
KENNETH W. HERBERT
Attorney for Borough of Fort Lee

DATED: August 4, 1989

Appendix J

SUMMONSES

C-442A to C-661A inclusive

EXHIBIT "A"

APPENDIX K — ORDER FOR DISMISSAL

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. 89-0385

Civil Action

POLLINGER & FEARNS, P.A.
485 Main Street
Hackensack, New Jersey 07601
(201) 487-5666
Attorneys for Defendant
Our File No. P-17,887(D)

BOROUGH OF FORT LEE,

Plaintiff.

v.

TCB TOWING,

Defendant.

ORDER FOR DISMISSAL

THIS MATTER having been appealed to this Court from verdicts of not guilty rendered in the Palisades Park Municipal Court, and it appearing that any appeal constitutes double jeopardy and is therefore improper, and for other good cause shown;

IT IS on this 2nd day of April, 1990,

ORDERED that this appeal is hereby dismissed with prejudice, but without costs.

Appendix K

s/ BENEDICT E. LUCCHI, J.S.G.
Benedict E. Lucchi, J.S.C.

APPENDIX L — CITY COUNCIL MINUTES OF THE BOROUGH OF FORT LEE

REGULAR MEETING

MAYOR AND COUNCIL

Thursday,
December 8, 1988

The Regular Meeting of the Mayor and Council of the Borough of Fort Lee was held on the above date in the Council Chambers, Memorial Municipal Building, 309 Main St., Fort Lee, N. J.

PRESENT: Mayor Corbiscello, Councilmembers LoFaro, Vogel, Nicholas, Salb, Levy, Buda

ALSO PRESENT: Ken Herbert, Borough Attorney Steve Cuccio, Borough Administrator Carol Kohout, Borough Clerk

MAYOR'S STATEMENT

Let the minutes reflect that adequate notice of this meeting has been provided in the following manner:

1. On January 3, 1988, this body by Resolution adopted a schedule of regular meetings. The time, date and location of this meeting was accurately set forth therein.

2. On January 4, 1988, a copy of said schedule was posted at 309 Main Street, Fort Lee, N. J. On the same date, a copy of said schedule was mailed to the Record, Dispatch, Sun Bulletin/Bergen News, Palisadian and the Monitor and filed with the Borough Clerk. Copies have also been mailed to all persons who have

Appendix L

requested same and who have prepaid the $10.00 fee for the year 1988 to cover the cost of providing notice.

MAYOR'S REPORT AND ANNOUNCEMENTS

Mayor Corbiscello announced that White House Fellowship Applications are available in his office.

PRESENTATIONS

Vision Cable TV Presentation

Lorrain Reardon of Vision Cable TV presented a Halloween Safety Award to Police officer Dennis Conway.

Volleyball Team and Junior Football Squad

Athletic Awards were presented to the members of the Girls Volleyball Team of the Fort Lee High School.

Assisting in the presentation were Dr. Alan Sugarman, Superintendent of Schools; John Richardson, High School Principal; Chris Onorato, Coach of the Team. The team won the designation of "Group II State Champs."

Joseph Surace introduced the coaches of the Fort Lee Junior Football Squad and accepted a trophy on their behalf.

WHEREAS, the Borough Attorney, who has been actively engaged in this litigation from the outset, recommends settlement of this litigation on the terms set forth below; and

WHEREAS, this matter has been presented for review by

Appendix L

Judge Joelson, Appellate Division, Retired, who recommended settlement of this litigation on the terms set forth below.

NOW, THEREFORE, BE IT RESOLVED that the Borough of Fort Lee hereby agrees to a settlement of the aforementioned litigation by a payment to Kinsey and Associates of $40,000 on or before January 31, 1989.

The Resolution was adopted unanimously.

Denying Towing License Applications AA American/TCB

Councilman Levy introduced and Councilman Buda seconded the following Resolution:

WHEREAS, TCB Towing and Road Service, Inc. of 404 East Edsall Blvd., Palisades Park, N.J. and AA American of 2035 Marguerite Street, Fort Lee, N.J. are two towing companies that have submitted applications for a Fort Lee Towing License for the year 1989; and

WHEREAS, these two applications have been referred to the Mayor and Council with recommendations from the Police Department that said applications be denied; and

WHEREAS, the Police Department has informed the Mayor and Council that both aforementioned applicants have continually and systematically engaged in towing operations within the Borough of Fort Lee during the year of 1988 without a towing license, notwithstanding the continual warning from the Police Department that such towing is in violation of law; and

WHEREAS, over five hundred (500) summonses have been

issued to TCB Towing for such aforementioned violation and over twenty (20) summonses have been issued to AA American, none of which having yet been brought to Court for a judicial determination; and

WHEREAS, notwithstanding the summonses and warnings of the Police Department, both TCB Towing and AA American continue to tow within the Borough of Fort Lee in violation of the Borough ordinance; and

WHEREAS, the Mayor and Council are satisfied that just and sufficient cause exists, as provided by Borough Ordinance 4-11.7, to deny said applications,

NOW, THEREFORE, BE IT RESOLVED that the application for towing licenses for 1989 submitted by TCB Towing and AA American be and are hereby denied.

The Resolution was adopted unanimously.

APPENDIX M — APPLICATION FOR TOWING LICENSE DATED DECEMBER 8, 1988

WHEREAS, TCB Towing & Road Service, Inc. of 404 East Edsall Blvd., Palisades Park, NJ and AA American of 2035 Marguerite Street, Fort Lee are two towing companies that have submitted applications for a Fort Lee Towing License for the year 1989, and

WHEREAS, these two applications have been referred to the Mayor and Council with recommendations from the Police Department that said applications be denied, and

WHEREAS, the Police Department has informed the Mayor and Council that both aforementioned applicants have continually and systematically engaged in towing operations within the Borough of Fort Lee during the year 1988 without a towing license, notwithstanding the continual warning from the Police Department that such towing is in violation of law, and

WHEREAS, over five hundred (500) summonses have been issued to TCB Towing for such aforementioned violation and over twenty (20) summonses have been issued to AA American, none of which having yet been brought to Court for a judicial determination, and

WHEREAS, notwithstanding the summonses and warnings of the Police Department, both TCB Towing and AA American continue to tow within the Borough of Fort Lee in violation of the Borough ordinance, and

WHEREAS, the Mayor and Council are satisfied that just and sufficient cause exists, as provided by Borough Ordinance 4-11.7, to deny said applications,

Appendix M

NOW, THEREFORE, BE IT RESOLVED that the application for towing licenses for 1989 submitted by TCB Towing and AA American be and are hereby denied.

[VOTE]

LeFaro — Yes
Vogel — Yes
Nicholas — Yes
Salb — Yes
Levy — Motion-Yes
Buda — Second-Yes

DATE Dec. 8, 1988
[Carried] √

APPENDIX N — MOTION DATED MAY 31, 1991

LAW DIVISION — CIVIL PART
BERGEN COUNTY
Docket No. L-39450-89

GERALD BENECKE, Individually and t/a TCB TOWING,

Pla intif f,

vs.

BORO OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KAHOUT, AND JOHN DOES (1-50)

Defendant.

Place: County Courthouse
Hackensack, NJ

Date: May 31, 1991

TRANSCRIPT OF RECORDED PROCEEDINGS

BEFORE:

HONORABLE MARGUERITE T. SIMON, J.S.C.

TRANSCRIPT ORDERED BY:

WILLIAM J. POLLINGER, ESQ.

APPEARANCES

Appendix N

WILLIAM J. POLLINGER, ESQ.
Attorney for the Plaintiff

TIMOTHY SAIA, ESQ.
Attorney for the Defendants

Prodeedings recorded by electronic sound recording, transcript produced by transcription service.

Transcriber: Sandra Carbonaro

FORDS, NEW JERSEY 08863
(201) 738-0633

Appendix N

* * *

THE COURT: I'm ready to give a decision. It's a harsh one, but I am going to grant summary judgment. I'm taking the facts in the light most favoable to plaintiff. And I'm reviewing the statute, 42 U.S. Code 1983, and I don't think I have to recite it, but it really does deal with rights, privileges and immunities and numerous cases in line. I just have two of them in front of me. One is City of Oklahoma City against Tuttle (phonetic) 471 U.S. 808, that's 1985. And City of St. Louis against Proprodnick (phonetic), that's — oh, I have the Supreme Court cite on that, if I could, that's 108 Supreme Court, 915, 1988. I don't have the U.S. cite.

But basically what the Courts do is look towards the actions of the municipal employees under respondeat superior, and look at those actions to see if the actions themselves could prove an existence of an unconstitutional municipal policy. And these cases, as well as the others, go into the nature of the actions, and the number of the actions. And I think if the more severe, the less that's required.

What have we got here? We have a situation where yes, there was procedural due process, and the fact of for example, summonses given where signatures were wrong. We don't — and we're dealing — I would distinguish this case very strongly from the story that Mr. Pollinger told me; although if I were to be strict, I wouldn't even consider that. But I do feel that it's highly different. One was there was a right. The person was on a towing list. He had — there was a right. That individual was on a towing list. That individual had a right which was deprived. Here there is no right, privilege or immunity being deprived, one reason. Second reason is the nature of the defect and it just can't be that every time there is a procedural defect throwing out claims, even if they're in great

number. That could not give rise to a 1983 cause of action. I'm satisfied that's not intended.

With regard to any conspiracy, I would point to Appellate Division case, Judge Brody's case, Hayes against Mercer County (phonetic). And that's 217 N.J. Super 614, 1987. And talking in terms of qualified immunity, et cetera. And I'm satisfied that no way is 1983 intended to really open up or remove claims for — strike that — the immunities granted to municipal officials under situations where the procedural lack of due process is of this nature, and not more severe than that. So I've got to grant summary judgment.

MR. SAIA: Thank you, your Honor.

MR. POLLINGER: As to all issues, your Honor?

THE COURT: Yes.

MR. POLLINGER: All issues and all parties?

THE COURT: Yes.

(Matter concluded)